

1 **UNITED STATES DISTRICT COURT**2 **DISTRICT OF NEVADA**

3 ZACKERY CRABTREE,

Case No.: 3:19-cv-00750-MMD-WGC

4 Plaintiff,

Report & Recommendation of  
5 v. United States Magistrate Judge

6 MICHAEL VIETA KABELL,

7 Defendant.

8  
9 This Report and Recommendation is made to the Honorable Miranda M. Du, Chief United

10 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to

11 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Plaintiff, who is incarcerated by the Nevada Department of Corrections (NDOC) and  
13 housed at Ely State Prison (ESP), is proceeding pro se, and has filed a document titled a Notice of  
14 Intent 42 U.S.C. §1983 Civil Rights Complaint (ECF No. 1-1). He subsequently filed a financial  
15 certificate. (ECF No. 3.) It was not accompanied by an application to proceed in forma pauperis  
16 (IFP).17 A person may be granted permission to proceed IFP if the person “submits an affidavit that  
18 includes a statement of all assets such [person] possesses [and] that the person is unable to pay  
19 such fees or give security therefor. Such affidavit shall state the nature of the action, defense or  
20 appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).21 The Local Rules of Practice for the District of Nevada provide: “Any person who is unable  
22 to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The  
23

1 application must be made on the form provided by the court and must include a financial affidavit  
2 disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some  
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)  
5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the  
6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 An inmate submitting an application to proceed IFP must also "submit a certificate from  
8 the institution certifying the amount of funds currently held in the applicant's trust account at the  
9 institution and the net deposits in the applicant's account for the six months prior to the date of  
10 submission of the application." LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been  
11 at the institution for less than six months, "the certificate must show the account's activity for this  
12 shortened period." LSR 1-2.

13 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount  
14 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an  
15 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly  
16 deposits or the average monthly balance for the six-month period immediately preceding the filing  
17 of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid, the  
18 prisoner is required to make monthly payments equal to 20 percent of the preceding month's  
19 income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency that has custody of  
20 the prisoner will forward payments from the prisoner's account to the court clerk each time the  
21 account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

22 Plaintiff did not file the required IFP application.

23 Once an IFP application and financial certificate are filed, the court screens the complaint.

1       Under the statute governing IFP proceedings, “the court shall dismiss the case at any time  
2 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--  
3 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or  
4 (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C.  
5 § 1915(e)(2)(A), (B)(i)-(iii).

6       Moreover, under 28 U.S.C. § 1915A, “[t]he court shall review, before docketing, if feasible  
7 or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a  
8 prisoner seeks redress from a governmental entity or officer or employee of a governmental  
9 entity.” 28 U.S.C. § 1915A(a). In conducting this review, the court “shall identify cognizable  
10 claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1) is frivolous,  
11 malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief  
12 from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

13       Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
14 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and  
15 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a  
16 complaint under these statutes, the court applies the same standard as is applied under  
17 Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under  
18 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,  
19 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

20       The court must accept as true the allegations, construe the pleadings in the light most  
21 favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395  
22 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less stringent  
23

1 standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)  
 2 (internal quotation marks and citation omitted).

3 A complaint must contain more than a “formulaic recitation of the elements of a cause of  
 4 action,” it must contain factual allegations sufficient to “raise a right to relief above the speculative  
 5 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain  
 6 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally  
 7 cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff  
 8 should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570; *see*  
 9 *also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

10 A dismissal should not be without leave to amend unless it is clear from the face of the  
 11 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
 12 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
 13 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

14 There are several deficiencies with Plaintiff's case. First, he has not filed an application to  
 15 proceed IFP for a prisoner.

16 Second, he has filed a notice of intent to file a civil rights complaint which contains certain  
 17 allegations but it is not clear this is the complaint upon which Plaintiff wishes to proceed. A civil  
 18 action is initiated by filing a civil complaint, not a notice of intent to file a civil rights complaint.

19 Finally, the court has undertaken a preliminary review of the allegations in the notice of  
 20 intent to file a civil rights complaint and has determined Plaintiff does not state a claim upon which  
 21 relief may be granted. Plaintiff indicates that he is suing Deputy District Attorney Michael Vieta  
 22 Kabell and avers that Mr. Kabell entered into a conspiracy with the judge and public defender and  
 23 sheriff to trick Plaintiff to enter into a deal, later described as a substantial assistance agreement.

1 Plaintiff claims this was illegal. In his request for relief, Plaintiff states that he seeks punitive  
2 monetary damages, that his lifetime supervision to be removed, and that his criminal conviction  
3 be vacated. (ECF No. 1-1.)

4 Normally, the court would allow Plaintiff to file an IFP application, and proceed with  
5 screening of the complaint; however, in this case, the court views this would be futile for several  
6 reasons. Plaintiff seeks to have his conviction overturned, and he cannot seek such relief in a civil  
7 rights action as it is barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (if a judgment in favor  
8 of the plaintiff would necessarily imply the invalidity of the conviction or sentence, the complaint  
9 must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already  
10 been invalidated). Plaintiff is already proceeding with a habeas petition: 3:19-cv-00479-LRH-  
11 CLB.

12 Moreover, Plaintiff cannot sue the deputy district attorney. This is because prosecutors are  
13 absolutely immune from liability under section 1983 liability when they are carrying out their  
14 function as an advocate. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Buckley v. Fitzsimmons*, 509  
15 U.S. 273, 277-78 (1993).

16 Therefore, it is recommended that this action be dismissed. Under *Heck v. Humphrey*, the  
17 dismissal should be without prejudice in the event he succeeds in having his underlying conviction  
18 overturned or otherwise declared invalid and can sue a proper defendant. *Belanus v. Clark*,  
19 796 F.3d 1021, 1025 (9th Cir. 2015) (citing *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th  
20 Cir. 1995)).

21 ///

22 ///

23 ///

## **RECOMMENDATION**

**IT IS HEREBY RECOMMENDED** that the District Judge enter an order  
**DISMISSING THIS ACTION WITHOUT PREJUDICE**, and administratively closing this  
case.

The Plaintiff should be aware of the following:

6 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
7 this Report and Recommendation within fourteen days of being served with a copy of the Report  
8 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report  
9 and Recommendation” and should be accompanied by points and authorities for consideration by  
10 the district judge.

11       2. That this Report and Recommendation is not an appealable order and that any notice of  
12 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
13 until entry of judgment by the district court.

Dated: March 17, 2020.

William G. Cobb  
United States Magistrate Judge